

**UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF NEW YORK**

David Lane Johnson,

Plaintiff,

-v-

National Football League Players
Association, et al.,

Defendants.

No. 1:17-cv-05131 (RJS)

Judge Richard J. Sullivan

***Plaintiff David Lane Johnson's Reply to Defendant NFLPA's
Memorandum in Opposition to Plaintiff's Motion to Vacate an Arbitration Award***

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INTRODUCTION

*“Right is right, even if nobody does it. Wrong is wrong, even if everybody is wrong about it.”*¹

All Plaintiff David Lane Johnson wanted from his disciplinary appeal was the “transparency” and “fair system of adjudication” the NFL Policy on Performance-Enhancing Substances 2015 (“Policy”) guaranteed him. Johnson properly based his defenses on the Policy’s express terms. To his detriment, Johnson expected the National Football League, the National Football League Management Council (jointly, “NFL”) and the National Football League Players Association (“NFLPA”) to abide by the Policy’s express terms; and that arbitrator James Carter would enforce them.

Johnson expected that an “unaffiliated” and “neutral” arbitrator, “automatically” assigned from a pool of three to five arbitrators, would hear his appeal. He expected that a neutral Chief Forensic Toxicologist (“CFT”) would certify his test results. He expected he would have access to documents necessary to assert his Policy rights: a complete copy of the Policy (including any amendments); his Policy testing records; and the testing protocols the Policy required the lab to follow. None of this happened. As a result, this Court should vacate the Award.

LAW AND ARGUMENT

I. JOHNSON OBJECTED TO THE ARBITRATOR SELECTION PROCESS

Courts enforce arbitrator selection clauses strictly and vacate awards issued by arbitrators whose “qualifications or method of appointment” do not conform to the arbitration agreement. *Avis Rent A Car Sys., Inc. v. Garage Empl. Union*, 791 F.2d 22, 25 (2d Cir. 1986). A defect in the method used to select an arbitrator leaves the arbitrator “powerless” to hear a dispute and an award issued by such an arbitrator “will not be enforced.” *Id.* This well-established principle

¹ *All Things Considered: Tom Jones and Morality*, Gerald Keith Chesterton, Methuen & Co., 36 Essex Street, London 1908, available at: https://en.wikisource.org/wiki/All_Things_Considered.

also prohibits an arbitrator from determining whether his selection was in accordance with the agreement. *Farrell v. Subway Int'l, B.V.*, No. 11 Civ. 08, 2011 WL 1085017, *4 (S.D.N.Y. Mar. 23, 2011) (citing *Stop & Shop v. UFCW Local 342*, No. 06 Civ. 3201, 2006 WL 1148728 (S.D.N.Y. May 1, 2006) (aff'd 246 Fed. Appx. 7 (2d Cir. 2007))).

Contrary to the NFLPA's arguments, and unaddressed in its Opposition (Doc. No. 113), Johnson sought information about the operation of the Policy's arbitrator selection process and arbitrators. *See* Doc. No. 116-13 at 10-11.² The NFL refused to respond on grounds that the information was "beyond the scope of discovery of the policy." Doc. No. 116-14 at 3. In a telephonic hearing before Carter, Johnson again asserted the issue:

There are already examples of the NFL's deviation from that policy, and while we have no objection to your qualifications, the citizen arbitrator in this matter, it is also clear that the letter of the policy with regard to arbitrator assignment has been deviated from, and there's no indication as to why or where that came from...

All Mr. Johnson wants is an opportunity to evaluate the process and the protocols and the determination that leads to the pending discipline notice from the NFL to ensure that it complies with the many provisions of the policy.

Doc. No. 110-13 at 3, 6:2-20 (emphasis added).³

In response to Johnson's objections, and knowing that Johnson questioned his authority under the Policy, Carter denied Johnson's requests for information about the arbitrators and the selection process on grounds they were "not directed to the basis of the notice of discipline." Doc. No. 116-15 at 3. Johnson incorporated his objections to Carter's discovery rulings, including arbitrator selection, into his arbitration presentation. Exhibit 2 (excerpts from arbitration hearing transcript) at 159:11-16, authenticated at D. Vance affidavit (Exhibit 1) at ¶ 8.

² Johnson cites to the page numbers in the top right corner of the document.

³ Johnson previously dispelled the NFLPA's erroneous assertion that the statement about Carter's objective "qualifications" waived Carter's undisclosed bias. *See* Doc. No. 112 at 17.

The NFLPA admits Carter was one of only two, not the required minimum of three, Policy arbitrators and that it did not notify Johnson of this until after he submitted his discovery requests. Doc. No. 113 at 9. The NFLPA contends that it reached “agreement” with the NFL to deviate from the Policy’s requirement for a minimum pool of three Policy arbitrators but, to date, has produced no written agreement or proof of its ratification as required by its Constitution.⁴

Furthermore, the NFLPA admits that, contrary to the Policy, Carter’s assignment to Johnson’s appeal was not “automatic.” Doc. No. 113 at 10-11. Defendants originally assigned Glenn Wong, the only other Policy arbitrator, to hear Johnson’s appeal. Despite this, and for reasons undisclosed to Johnson, Wong could not preside in-person, which is the default Policy hearing method. Doc. No. 39-1 at 1798. Because no other Policy arbitrators existed, Johnson faced the Hobson’s choice of proceeding before Carter. Doc. No. 113 at 11-12. The NFLPA’s contention that this represents Johnson’s “election” of Carter is, thus, irrational.

The Policy required that an arbitrator automatically assigned from a pool of at least three arbitrators based on the pre-determined schedule set by the Notice Arbitrator (selected by the arbitrators) would hear Johnson’s appeal.⁵ In violation of the Policy’s express arbitrator selection method, Carter, one of only two Policy arbitrators, heard Johnson’s appeal because no other arbitrator existed in violation of the Policy. Johnson’s information requests about this

⁴ The NFLPA’s violation of its Constitution’s ratification requirement is a *prima facie* case of breach of its duty of fair representation (“DFR”). Doc. No. 112 at 22-23. The absence of a valid amendment to the Policy requirement for a minimum pool of three arbitrators demonstrates that Carter’s selection for Johnson’s appeal did not comply with the Policy and that he had no authority to issue the Award. The NFLPA’s DFR breach substantially affected the arbitration process and provides separate grounds for vacatur. Doc. No. 39 at ¶¶ 316-32.

⁵ The NFLPA further admits that, contrary to the Policy’s requirement that the arbitrators themselves appoint the Notice Arbitrator who is responsible for arbitrator scheduling, the NFL and the NFLPA “jointly selected” Wong as Notice Arbitrator. Doc. No. 113 at 7. Furthermore, the NFL admitted it and the NFLPA “scheduled” arbitrators for hearings in violation of the Policy’s requirements that the Notice Arbitrator do so. Doc. No. 116 at 4-5.

specific issue were denied by the NFL, the NFLPA, and Carter, who deemed a question of compliance with the Policy's arbitrator selection and assignment terms irrelevant.

Under the law of this Circuit, Carter had no authority to hear the appeal, determine his own authority to do so, or issue the Award. Vacatur is required.

II. CARTER FAILED TO DISCLOSE MATERIAL CONFLICTS

The NFLPA goes all-in on explaining away Carter's undisputed failure to disclose information indicative of bias to Johnson who, unlike the NFLPA, was a party to the proceeding. *See* Doc. No. 39-2 at 1835 (Carter identified Johnson as a party, not the NFLPA); Doc. No. 109 at 25 (the matter before Carter was Johnson's "own appeal" not the NFLPA's). Additionally, the NFLPA's presentation of the "evident partiality" standard ignores the Policy language it negotiated, which required neutral arbitrators who were "not affiliated" with the "NFL, NFLPA or [NFL] Clubs." *See* Doc. No. 39-1 at 1796. The Court must analyze Carter's disclosure obligations and evident partiality in light of the express Policy terms.

A. Carter Failed His Duty to Disclose Affiliations

"Affiliation" is defined as 'associated with.'" *Matter of Griffiss Local Dev. Corp. v. State of N.Y. Auth. Budget Office*, 85 A.D.3d 1402, 1404 (N.Y. App. Div. 2011) (quoting Merriam-Webster On-line Dictionary).⁶ Carter had a duty under controlling law, as noted in his book, to investigate and disclose to all parties, including Johnson, any associations between himself and the NFL, NFLPA or NFL Clubs that raise reasonable doubts about his partiality. Furthermore, the strict Policy terms demanded that Carter disclose prohibited associations. It is undisputed Carter made no such disclosures to Johnson. Doc. No. 116-1 at ¶ 9; Doc. No. 116-2 at ¶ 19.

⁶ As stated by the NFLPA, the main NFL/NFLPA collective bargaining agreement is interpreted in accordance with New York State law. *See* Doc. No. 56 at 3277 and fn. 9.

It also is undisputed that Carter's law firm had been associated with, and continued to associate with, the NFL, the NFLPA and NFL Clubs. In the *Pennel* matter, two months after the Award, Carter disclosed that his firm could continue, "to represent the NFL, the NFL Players Association, NFL teams, owners, players or other personnel" and that he was aware of a current matter in which his firm provided direct representation to the NFL. Doc. No. 116-21 at 1. Carter never disclaimed any pecuniary interest or affirmed that other firm members were "walled off" from his service as a Policy arbitrator. *See Sanko SS. Co. v. Cook Indus.*, 495 F.2d 1260, 1264 (2d Cir. 1973) ("the better practice is that arbitrators should disclose fully all their relationships with the parties, whether these ties be of a direct or indirect nature"). Carter's association with the NFL violated the Policy's prohibition on "affiliated" arbitrators and is additional grounds for vacating the Award. *See Avis Rent A Car*, 791 F.2d at 25 (the awards of arbitrators whose "qualifications and appointment" do not comply with the arbitration agreement are vacated).

The NFLPA claims Carter's failure to disclose this information to Johnson is irrelevant because he disclosed it to the NFLPA. Doc. No. 113 at 19. Yet, the NFLPA admits that, despite knowing of Johnson's repeated requests about Policy arbitrators and the selection process, it never told him of Carter's affiliations with the NFL.⁷ Also, arbitrators must make disclosures to the parties, which, per the Award, included Johnson, not the NFLPA. Doc. No. 39-2 at 1835; *Commonwealth Coatings Corp. v. Cont'l Casualty Co.*, 393 U.S. 145, 149 (1968); *see also Lucent Techs., Inc. v. Tatung Co.*, 379 F.3d 24, 29 (2d. Cir. 2004) (discussing *Commonwealth Coatings*' "requirement" that "relationships" indicative of bias "be disclosed at the outset" of the proceeding) (quoting *Commonwealth*, 393 U.S. at 151 (White, J. concurring)).

⁷ The NFLPA's failure to inform Johnson of Carter's conflicts and its decision to waive them in violation of express Policy terms without a ratified amendment is another basis for Johnson's DFR breach claims against the NFLPA. *See* Doc. No. 39 at ¶¶ 316-332. The NFLPA cites no authority that its arbitrary elimination of Policy terms absolved Carter's failure to disclose.

Furthermore, Carter obviously knew his associations with the NFL reasonably raised questions about his impartiality. It is uncontested that Carter did not disclose those associations to Johnson and denied Johnson's repeated requests for information about all Policy arbitrators. "[W]hen an arbitrator knows of a potential conflict, a failure to either investigate or disclose an intention not to investigate is indicative of evident partiality." *Appl'd Indust'l Mat. Corp v. Ovalar Makline Ticaret Ve Sanayi, A.S.*, 492 F.3d 132, 138 (2d Cir. 2007).

The NFLPA cites distinguishable authority on the issue of evident partiality. Doc. No. 113 at 16-21. In none of the decisions the NFLPA cited did the arbitration agreement have an express provision requiring "unaffiliated" arbitrators, as the Policy requires. Moreover, in none of the cited cases did the evidence demonstrate that the arbitrator disclosed information indicative of bias to one party but not to the other, as occurred here. Finally, in each case the NFLPA cites, the arbitrator made disclosures and/or the court record included evidence as to the specific nature of the arbitrator's business dealings, neither of which exists here.

Carter's failure to disclose associations that violated express Policy terms and his legal obligations suggests bias and is grounds for vacatur.

B. Johnson Could Not Waive Conflicts of Which He Was Not Aware

The NFLPA asserts Johnson "knew or should have known" the scope of Carter's firm's regular and ongoing business with the NFL because -- Google. Doc. No. 113 at 9, fn. 4. The NFLPA makes this claim despite admitting Carter disclosed information indicative of bias to it in 2015 and that it kept Carter's disclosures from Johnson until it filed the declaration in this case. Doc. No. 114. Carter also kept his disclosures from Johnson, a party to the appeal.

While Johnson, through counsel, reviewed Carter's online firm biography prior to the arbitration, it makes no mention of his service under the Policy or the separate NFL Policy and

Program on Substances of Abuse, let alone his firm's ongoing representation of the NFL, NFLPA and NFL clubs. *See* Exhibit 1 (affidavit of D. Vance) at ¶¶ 3-4; Doc. No. 113 at 8, fn. 3. Moreover, Carter's partial disclosure in *Pennel*, stated that, in December 2016, his firm provided active counsel to the NFL, which information neither existed in Carter's biography nor could Johnson have ever known about it through any Google search. Doc. No. 116 at 24. In short, the NFLPA provided no evidence that Johnson "knew or should have known" of the information in the record indicative of Carter's prohibited affiliations and bias.

The NFLPA again cites readily distinguishable authority. Doc. No. 113 at 10-15. Unlike the cases the NFLPA cited, Johnson specifically "inquired" about Policy arbitrators verbally and in writing, but the NFL, NFLPA and Carter, knowing of Carter's improper affiliation, denied Johnson that information, deeming it "irrelevant." As a result, Johnson did not, and could not have "knowledge of the facts possibly indicating bias" and, thus, could not have waived specific objections based on those facts. *See LGC Holdings, Inc. v. Julius Klein Diamonds, LLC*, 238 F.Supp. 3d 452, 467 (S.D.N.Y. 2017) (quoting *AAOT Foreign Econ. Ass'n v. Int'l Dev. & Trade Servs., Inc.*, 139 F.3d 980, 982 (2d Cir. 1998)). Ironically, in *Pennel*, the NFLPA argued that no challenge to an arbitrator's competence is ripe until after the award issues. Doc. No. 113-8 at 5-6. Here, it chides Johnson for not seeking to remove Carter pre-Award. Doc. No. 113 at 14-15.

Despite Johnson's multiple requests, Defendants and Carter withheld information indicating Carter's bias and prohibited affiliation and the NFLPA's assertion Johnson waived his objections on this issue is absurd.

III. CARTER DEMONSTRATED EVIDENT PARTIALITY, AND HIS AWARD DID NOT DRAW ITS ESSENCE FROM THE POLICY

Johnson has catalogued Carter's misconduct and disregard for the Policy. Doc No. 39 and Doc. No. 116. The undisputed facts beg the question: "Why would an arbitrator of Carter's

‘impeccable credentials’: 1) assert jurisdiction knowing of questions about his selection; 2) deny Johnson information about arbitrator selection; 3) deem arbitrator selection information irrelevant; 4) deny Johnson a purported written Policy amendment eliminating the CFT certification requirement; 5) refuse Johnson’s request for the lab protocols, thus denying him the express Policy right to challenge whether the lab followed them; or, 6) allow the NFL to flout his order to produce the lab protocols without consequence?” In each case, Carter chose to disregard the Policy, deny Johnson’s express Policy rights and the information necessary to assert them, and eliminate the NFL’s Policy-imposed burden of proof. Contrary to the NFLPA’s suggestion, the issue is not Johnson’s disagreement with Carter’s decisions, but Carter’s disregard for express Policy terms and its requirement for “transparency” and a “fair system of adjudication.”

To salvage Carter’s inexcusable decision not to require production of the purported CFT certification amendment, the NFLPA contends it and the NFL “proffered” that such agreement existed. Doc. No. 113 at 27. The NFLPA’s “proffer” consisted entirely of the following vague statement: “Yes. That’s my understanding that it was agreed to at the lab as the term.” Doc. No. 116-6 at 9:6-7. While Carter leapt upon the NFL and NFLPA’s “proffer” as definitive evidence of the alleged “amendment,” Johnson demanded to know if it was written, its specific terms, and whether the Union ratified such a modification. Doc. No. 116-6 at 9:10-17. Carter ignored Johnson’s requests, concluded the Policy had been amended, and based his decision on the existence of the amendment, all without ever setting eyes on it. Doc. No. 39-2 at 1841.

“Proffered evidence” is “evidence that is offered to the court to obtain a ruling on admissibility.” *See* Black’s Law Dictionary, 7th Ed. B. Garner ed. at 579 (2001). Johnson repeatedly asked that the NFL or NFLPA produce the “amendment” for admission into the record. Accordingly, the NFLPA’s assertion of a “proffer” is nonsensical and cannot absolve

Carter's decision to render the Award based on an amendment he refused to put in the record. *See Home Indem. Co. v. Affiliated Foods Distribs.*, No. 96 Civ. 9707, 1997 WL 773712, *4 (arbitrators affirmative duty "to insure that relevant documentary evidence in the hands of one party is fully and timely made available to the other party ... a failure to discharge this simple duty would constitute a violation of [FAA § 10(a)(3)], where a party can show prejudice as a result") (citing *Chevron Trans. Corp. v. Astro Vencedor Compania Vaviera, S.A.*, 300 F.Supp. 179, 181 (S.D.N.Y. 1969)). As a positive Policy test required the CFT's certification (Doc. No. 39-1 at 1799), Carter's actions voided the Policy's express terms and prejudiced Johnson.⁸

The NFLPA's Opposition purports to attach the alleged CFT amendment. Doc. No. 113-9 ("Exhibit I"). First, Exhibit I clearly states that it amends the "2014 Policy on Performance Enhancing Substances" and not the 2015 Policy applicable here. Doc. No. 39-1 (emphasis added). Second, the NFLPA provides no evidence that it ratified Exhibit I per its Constitution or that it applies to the 2015 Policy. Bafflingly, the NFLPA provides no explanation as to why it did not produce Exhibit I during the hearing or when Johnson first requested it weeks before.

The NFLPA cannot explain the nullification of the Policy's terms as arbitral discretion. *See In re Marine Pollution Serv., Inc.*, 857 F.2d 91, 94 (2d Cir. 1988) ("An arbitrator may not shield an outlandish disposition of a grievance from judicial review simply by making the right noises -- noises of contract interpretation" nor dispense his own brand of industrial justice) (internal quotes omitted). The NFLPA's Opposition actually reinforces Johnson's claims as to Carter's misconduct and supports vacating the Award.

⁸ Johnson previously refuted the NFLPA's baseless contention that he "admitted" a Policy violation. *See* Doc. No. 112 at 8.

IV. THE NFLPA CANNOT DEFEND THE ARBITRATION PROCESS

The NFLPA refused to “address Johnson’s arguments about the substance or process of the arbitration itself.” Doc. No. 113 at 6. By its silence, the NFLPA admits Johnson was denied express Policy rights in violation of the negotiated Policy terms. The NFLPA’s silence begs the question -- if those express Policy terms did not guarantee Johnson substantive rights, why did the NFLPA bargain for them in the first place? That the NFLPA has no answer supports Johnson’s DFR breach and demands vacatur.

Furthermore, the NFLPA’s refusal to address Johnson’s claims astounds in light of its full-throated assertion of fundamental fairness as the sole basis for its attempt to vacate the Ezekiel Elliott arbitration award currently before this Court and the Second Circuit. *See NFLMC v. NFLPA*, Case No. 17-cv-6761-KPF (S.D.N.Y) and *NFLMC v. NFLPA*, Case No. 17-3501 (2d Cir.). The express Policy violations in this case make the Elliott arbitration, which is under the main NFL/NFLPA collective bargaining agreement, look like a day at the U.S. Supreme Court.⁹

The NFLPA’s refusal to challenge Johnson’s fundamental unfairness claims evidences its arbitrary, discriminatory, and bad faith representation of Johnson in violation of its DFR.

CONCLUSION

For these reasons and those set forth in his Motion to Vacate and supporting briefing, Johnson respectfully requests that this Court vacate the Award.

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⁹ Article 46 of the main CBA, which applies to Elliott, does not include an express fairness guarantee, a definitive right to discovery, or the express Policy protections applicable here. *See* Exhibit 3 (Article 46) filed by the NFLPA in Elliott matter; *see also NFL Mgmt. Council v. NFL Players Ass’n*, No. 17 Civ. 6761 (KPF), 2017 WL 4998198, **4-5 (S.D.N.Y. Oct. 30, 2017).

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CERTIFICATE OF SERVICE

The undersigned certifies that on November 8, 2017 the foregoing was filed using the Court's CM/ECF system. All parties and counsel of record will receive notice and service of this document through the Court's CM/ECF electronic filing system.

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